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Now You See It, Now You Don't: Depublication and Nonpublication Of Opinions Raise Motive Questions

BY BENNETT L. GERSHMAN

The judicial opinion is the heart of the common law system. The judicial opinion is what law students study, lawyers research and argue, and judges apply through the doctrine of precedent. By authoritatively declaring and interpreting a general principle of law, the opinion promotes stability, certainty, and predictability of law. By its fidelity to authority and principle, the judicial opinion assures the legitimacy and accountability of our judicial process, and, for that matter, of our judges.

The judicial opinion, however, does not always live up to its role. Judicial opinions sometimes hide or misrepresent facts, are withdrawn from public scrutiny after having already been published, or are not even published at all. By these methods, the judicial opinion, which to many is the equivalent of a sacred text, becomes vulnerable to criticism over the motive for the alteration. And the suggestion of improper motive may undermine the legitimacy of the appellate judicial process itself.

The basis for these comments is a decision last year by the Eighth Circuit Court of Appeals in *Anastasoff v. United States*.¹ The court held that an Eighth Circuit local rule, which authorized nonpublication of opinions and explicitly stated that unpublished opinions were to have no precedential effect, was unconstitutional. The panel, in an opinion by Judge Richard S. Arnold, reasoned that a court rule purporting to confer upon appellate judges an absolute power to decide which decisions would be binding and which would not be binding went well beyond the "judicial power" within the meaning of Article III of the U.S. Constitution.²

To be sure, *Anastasoff* addressed only one example of an appellate court deciding for itself the precedential effect of its prior written decisions simply by not allowing them to be published, or by not allowing them to be formally cited. But courts also apply other methods that manipulate judicial opinions to conceal information about the reasoning behind the decision, why the decision was altered, or why the decision was excised from public scrutiny. These methods include (1) misstating or distorting the facts, (2) altering factual findings or legal

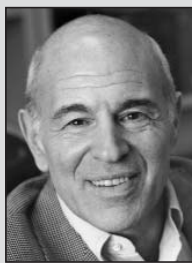
conclusions that were previously made, (3) excising opinions that have already been published, and (4) issuing opinions that are not even published.

Misrepresenting Facts

It is hardly a secret that courts misstate facts. Every lawyer involved in litigation probably can cite several instances of courts misstating or distorting the facts in a particular case. To be sure, the extent to which courts misrepresent facts is hard to measure. Most of the time the only persons who know about it are the attorneys who argued the case. And they are unlikely to criticize the court publicly. To give the court an opportunity to rectify a material misstatement, the lawyer may file a motion to reargue the case based on the court's mistaken description of the facts. But it is rare that a court will even acknowledge a mistake, let alone correct it.

Why do courts misstate facts? The volume of litigation sometimes may account for a court's lackadaisical attitude toward the facts of a case. There are also instances, however, in which there is little doubt that a court has closely examined and understood the factual record, and then produced a recitation and interpretation of the facts that not only is at variance with the record, but appears to have been deliberately reconstructed to achieve a particular result.

One well-known instance is *Harris v. New York*,³ in which the U.S. Supreme Court held that statements elicited in violation of *Miranda v. Arizona*⁴ may be used to impeach a defendant's credibility. In deciding this controversial question, the Court's majority declared:



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"Petitioner makes no claim that the statements made to the police were coerced or involuntary."⁵ However, it is absolutely clear that the record contains abundant evidence that such a claim was made, and that the facts in the case plausibly support such a claim.⁶

Another example of an arguably deliberate misrepresentation of the factual record is provided by Professor Anthony D'Amato, in describing the facts in a notorious Chicago murder case. D'Amato, who participated in the federal habeas corpus proceedings, convincingly argues not only that the defendant was factually innocent, but that the opinion of the Seventh Circuit Court of Appeals seriously distorted the facts. The most telling misrepresentation was the court's treatment of the time line for the murder to create a theory justifying the defendant's conviction. In doing so, the court had to discount the prosecution's own theory of the time line.

Critics have complained that courts frequently falsify or misrepresent facts. Dean Monroe Freedman, in a speech to the Federal Circuit Judicial Conference, protested the practice whereby judicial opinions "falsify the facts of the cases that have been argued," make "disingenuous use or omission of material authorities," or "cover up these things with no-publication or no-citation rules."⁷

Changing the Facts of an Already Published Opinion

The extent to which appellate courts change the substance of a previously published opinion is difficult to ascertain. There often is no way to study the question unless one is able to compare the original opinion, either in a slip sheet, advance sheet, or electronic format, with the version as it finally appears in a hardbound volume. There are occasions, of course, when a judicial opinion notifies its audience of a substantive change, typically by reciting that the original opinion has been amended. However, sometimes opinions are changed without any notice, so that it becomes very difficult for anyone other than the attorneys to know of the alteration.

For example, in *United States v. Valentine*,⁸ the Eleventh Circuit vacated a sentence because the district judge committed plain error in failing to give the defendant notice that it was considering increasing the sentence from the sentencing range provided by the Federal Sentencing Guidelines. However, in the original opinion electronically reproduced on Westlaw,⁹ the court included the following passages highly critical of the prosecutor:

Responsibility for this error, we believe, lies equally with the Assistant United States Attorney ("AUSA"). When prosecuting a criminal case, an AUSA is both a representative of the United States and an officer of the court; as such, he or she is charged with ensuring that justice is done according to law.

In Valentine's sentencing hearing, the district judge departed upward sua sponte from the guideline offense level, eventually arriving (through no guided means) at a sentence approximately three times as severe as the one mandated by the guidelines. The AUSA knew—or should have known—not only that an unguided departure was of questionable legality, but also that the district court, in imposing its sentence, had disregarded Burns' instructions. [*Burns v. United States*, 501 U.S. 129 (1991)]. The AUSA's obligation at sentencing (as an officer of the court) was to inform the district court of such error in the hope that the court would obviate the need for this appeal by remedying the error. The resources of this court, the district court (which now must conduct a new sentencing hearing), and the office of the United States Attorney (which has had to brief and argue this appeal as well as participate in a new sentencing hearing) are too limited to waste on unnecessary—and easily avoidable—litigation.

In the official version of the opinion formally published in Volume 21 of the Federal Reporter 3d Series, the above paragraphs were excised,¹⁰ leaving only the isolated reference to the district court's commission of "plain error" in not affording the defendant notice of the proposed sentence. Moreover, there is no indication in the final published opinion why the original opinion was changed, or why the court's initial rebuke of the prosecutor was removed.

Another instance of a court altering findings contained in an originally published opinion is the opinion of the Second Circuit Court of Appeals in *United States v. Reyes*.¹¹ In *Reyes*, the Second Circuit reversed a narcotics conspiracy conviction because the prosecutor elicited inadmissible hearsay testimony from a government agent by contending that the testimony was merely "background," when in fact it was used to prove the truth of the information and thereby seriously prejudice the fair trial rights of the defendants. The following is a portion of the prosecutor's direct examination of the agent:

Question: [By Prosecutor]: Now, did you have further discussions with [Fernando and Francisco] [two other co-conspirators] at some time after one o'clock on September 20 of 1990?

Answer: [By Customs Agent Caggiano]: Yes

Question: And did those further discussions with these individuals cause you to believe that there were other people involved with them in this particular criminal activity?

Answer: Yes, I did.

Question: And who were those two individuals?

Answer: Would you repeat the question?

Question: Yes. As a result of your further conversations, did you come to a conclusion that there were other individuals involved in this criminal enterprise?

Answer: Yes, I did.

Question: And who were those other individuals?

Answer: Rafael Reyes and Jeffrey Stein.¹²

In its originally published version, in the form of a slip opinion as well as in the electronic reproduction, the Second Circuit found that the Assistant United States Attorney who prosecuted the case had unfairly manipulated the direct examination of the government agent by pretending to offer the testimony for the non-hearsay purpose of explaining the agent's state of mind, when in reality the prosecutor was using the testimony for the forbidden purpose of insinuating that other co-conspirators had acknowledged to the agent that co-defendants Reyes and Stein had participated in the conspiracy. The Second Circuit agreed that the trial prosecutor had used this proof

not for the limited non-hearsay purpose for which the evidence was *apparently* offered, but for the truth of what Fernando stated. In addition, the Assistant United States Attorney [in his summation] seriously distorted and exaggerated what Fernando was reported to have said.¹³

However, in its amended opinion, contained in the official version published in Volume 18 of the Federal Reporter 3d Series, the passage above has been eliminated. In its place, the appellate panel wrote:

We are assured by the Government and are fully convinced that the discrepancy between Caggiano's testimony and the summation was not intentional. Although the mistake had innocent origins, our concern is for its possible effect on the jury, especially in that it was coupled with the other hearsay testimony that communicated Fernando's implication of Stein.¹⁴

The court's absolution of the prosecutor of any misconduct in its revised opinion is curious. To an informed observer familiar with the record, the prosecutor in *Reyes* committed deliberate misconduct by questioning the agent under the guise of "background" for the purpose of introducing enormously damaging testimony that one co-conspirator had identified two other co-defendants as having participated in the conspiracy. Every experienced prosecutor is aware of how this pernicious tactic can subtly circumvent the hearsay rule and the Confrontation Clause.¹⁵ A court is fully justified, as was the Second Circuit in its original opinion, in concluding that the prosecutor intentionally planted in the jurors' minds the unfair and highly damaging impression that the one defendant had implicated other defendants.

Another egregious instance of a court cleansing the record of references to prosecutorial misconduct is *United States v. Collicott*.¹⁶ In *Collicott*, the Ninth Circuit Court of Appeals reversed a narcotics conviction because the trial judge erroneously admitted hearsay statements expressly insinuating the defendant's guilt under the mistaken exceptions for prior consistent statements and past recollection recorded. The trial error was

obvious, and the prejudice considerable, as the Ninth Circuit concluded. However, in its original opinion, published in the official soft-cover Federal Reporter "advance sheets" as well as reproduced electronically, the court appended a footnote that harshly rebuked the trial prosecutor:

Though the trial court erred in admitting Zaidi's prior statements, it did so only upon invitation from the Government. We admonish the Assistant U.S. Attorney in this case for engaging in prosecutorial overkill, a practice employed by a few overzealous prosecutors who try to slip in damaging evidence through the back door, without focus on the rules of evidence or the consequences on appeal, hoping that this scattergun approach will hit some evidentiary target.

Regrettably, and incomprehensibly, the appellate panel excised this footnote from its published opinion in the hardbound Volume 92 of the Federal Reporter 3d Series. Thus, the original opinion, containing an important judicial critique of a common, and flagrant, prosecutorial tactic of introducing damaging hearsay through the "back door," has been erased.¹⁷

Finally, there are occasions when an appellate court decides that it is appropriate to identify by name in a judicial opinion an attorney who has committed misconduct or otherwise violated rules of trial practice. Indeed, given the paucity of professional or other discipline of errant lawyers, and particularly of prosecutors, courts have suggested that such personal attribution might serve as an effective deterrent to misconduct.¹⁸ So, in *United States v. Kojayan*,¹⁹ the Ninth Circuit reversed a narcotics conviction because the prosecutor committed outrageous misconduct by lying to the jury and the trial judge about whether a particular cooperating witness was available to give testimony for the government. After the defense attorney argued in summation that a particular individual who was privy to the drug transaction could have been called as a government witness, but was not, the prosecutor made the following statement to the jury:

The government can't force someone to talk. He has the right to remain silent. Don't be misled that the government could have called Nourian.

The prosecutor was lying, because as the opinion correctly notes, the witness had entered into a cooperation agreement with the prosecutor and had promised to testify truthfully in any matters in which the government might request his testimony. In reversing the conviction, the Ninth Circuit, in a scathing opinion by Judge Alex Kozinski, condemned the prosecutor for his deceit. Indeed, the misconduct was so flagrant that the court identified the prosecutor by name throughout the opinion, which was originally published electronically and in California's Daily Appellate Report.²⁰ However, in

the published decision of *Kojayan* that appears in the hardbound Volume 8 of the Federal Reporter 3d Series, the places in the original opinion where the prosecutor's name appeared have been changed to "the Assistant United States Attorney," or the "AUSA." Although the court's harsh rebuke remains, and the conviction vacated, the opinion now conceals the prosecutor's identity, and the court gave no reason why it suppressed that information.

Excising Published Opinions

Occasionally, courts issue opinions that are duly published in the regional reporter's "advance sheets" and given an appropriate numerical citation, only to be withdrawn when the opinion is formally reproduced in the hardbound volume of the reporter. When the reader goes to the particular pages of the bound volume, the reader encounters a series of blank pages where the earlier published opinion would have been reproduced. Moreover, there is no indication by the court of the reason for the removal of the opinion. Indeed, the deletion of some arguably controversial opinions raises troubling questions about the motivation for the deletion.

Two examples suffice. In *United States v. Tarricone*, originally published in a soft-cover advance sheet,²¹ as well as electronically,²² the Second Circuit Court of Appeals remanded the case to the trial court for a hearing to determine whether false testimony by the prosecution's cooperating witness affected the jury's verdict. The panel's opinion is emphatically clear that the federal prosecutors knew that their witness's testimony was false. The appellate panel wrote: "The government's action in deliberately soliciting testimony which it had every reason to believe to be false, and which it now concedes was false, is altogether unacceptable."²³ However, in Volume 11 of the Federal Reporter 3d Series, pages 24-26 are blank, and there is only an "Editor's Note" that this opinion has been withdrawn at the court's request. There is no explanation for the withdrawal.

Similarly, in *United States v. Escamilla*, published in the soft-cover advance sheets,²⁴ the Ninth Circuit Court of Appeals reversed a narcotics conviction because the trial prosecutor improperly introduced statements made by the defendant during a plea agreement which was later revoked. According to the court, the prosecutor engaged in "fundamental unfairness" by using the benefit of its plea bargain to convict the defendant, but denying the defendant his benefit of the bargain.²⁵ How-

ever, as in *Tarricone*, pages 465-469 of hardbound Volume 975 of the Federal Reporter 2d Series are blank, since the opinion was ordered withdrawn by the court. No explanation is given for the excision.

Unpublished Opinions

The opinion's role is drastically reduced by practices such as selective publication, summary disposition, and *vacatur* upon settlement. Unpublished opinions are an extremely common practice in the federal system. Federal courts of appeals, under a variety of differing and inconsistent rules, issue well over 10,000 unpublished opinions annually. There has been considerable academic and judicial commentary over the practice, much of

it critical. The *Anastasoff* case, discussed above, is only the latest manifestation of the controversy.

Summary disposition occurs when a court announces its judgment of affirmance or reversal orally in open court or with a very brief (usually one sentence or one word) order without any explanation for the disposition.

There are nearly as many summary dispositions as there are unpublished opinions. The precedential value of summary dispositions is unclear and varies from circuit to circuit.

Vacatur upon settlement is a practice whereby courts excise decisions in accordance with settlement agreements by the parties. Again, the use of this practice varies among the circuits. The *vacatur* has the effect of nullifying a court's decision without any explanation of the reasons. Thus, there may be confusion about the state of the law following *vacatur*, because the vacated judgment leaves a void regarding whether the vacated judgment was correct.

The dominant rationale for non-publication has been the explosion of the courts' dockets and the costs associated with expanded publication of routine cases that arguably do not establish new law. An efficiency rationale for limiting publication is the extent to which it helps alleviate the huge backlog of cases. If opinions are selectively published, judges can spend less time writing opinions and more time deciding a greater number of cases.

However, routinely suppressing decisions has several costs. Unpublished opinions, as Judge Patricia Wald wrote, "increase the risk of nonuniformity, allow difficult issues to be swept under the carpet, and result in a body of 'secret' law practically inaccessible to many lawyers."²⁶ This criticism has considerable merit. And now that the explosion in electronic reporting has made

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unpublished opinions more accessible, there may be less need for such a rule. In any event, courts should permit anyone, party or nonparty, to petition a court to publish an unpublished opinion. Finally, the practice of *vacatur* upon settlement should be abolished, and courts should be prohibited from summarily disposing of a case without clearly explaining the reasons for the decision.

Conclusion

As this discussion has demonstrated, much of the law is hidden from the public's view. Judges control their cases, their dockets, and the manner and openness of the decision-making process. Nobody would disagree that the law needs to be visible to the public, and judges need to be accountable to the public. A court's written opinion reveals to the public the court's analysis, reasoning, and grounds for decision. The opinion provides a safeguard against judicial abuse of power or dereliction of responsibilities. Hiding or altering opinions without adequate explanation affects the legitimacy of the judicial process, and of the law.

1. 223 F.3d 898, *vacated*, 235 F.3d 1054 (8th Cir. 2000).
2. As discussed below, such "no publication," or "no citation" rule is commonplace in every federal circuit and many state courts, and has been the subject of extensive academic commentary.
3. 401 U.S. 222 (1971).
4. 384 U.S. 436 (1966).
5. *Harris*, 401 U.S. at 224. The statement is crucial because the Court later suggests that an involuntary statement probably could not be used to impeach. *Id.* at 229 n.2.
6. For an excellent discussion of the Court's misrepresentation, and the likely reasons, see Alan M. Dershowitz & John Hart Ely, *Harris v. New York: Some Anxious Observa-*

tions on the Candor and Logic of the Emerging Nixon Majority, 80 Yale L.J. 1198 (1971).

7. Monroe Freedman, Speech to The Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit (May 24, 1989), *reprinted in* 128 F.R.D. 409, 439 (1989).
8. 21 F.3d 395 (11th Cir. 1994).
9. 1994 WL 171600, *3 (11th Cir. Ga.) (The opinion as originally published at this cite no longer exists. The user is directed to the official decision).
10. *Valentine*, 21 F.3d at 398.
11. 18 F.3d 65 (2d Cir. 1994).
12. *Id.* at 67.
13. *Reyes*, No. 93-1570, slip op. at 1841. (The opinion as originally published at this cite no longer exists. The user is directed to the official decision).
14. *Reyes*, 18 F.3d at 69.
15. See *Mason v. Scully*, 16 F.3d 38 (2d Cir. 1994); *Zemo v. State*, 646 A.2d 1050, 101 Md. App. 303 (1994); *People v. Tufano*, 69 A.D.2d 826, 415 N.Y.S.2d 42 (2d Dep't 1979).
16. 92 F.3d 973 (9th Cir. 1996).
17. See Bennett L. Gershman, *Prosecutorial Misconduct in Presenting Evidence: "Backdooring" Hearsay*, 31 Crim. L. Bull. 99 (1995).
18. See *United States v. Modica*, 663 F.2d 1173 (2d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).
19. 8 F.3d 1315 (9th Cir. 1993).
20. 93 Daily Journal D.A.R. 10030; 93 Cal. Daily Op. Service 5859, 1993 U.S. App. LEXIS 19873 (9th Cir. 1993).
21. 11 F.3d 24 (2d Cir. 1993).
22. 1993 U.S. App. LEXIS 31550 (2d Cir. 1993).
23. *Tarricone*, 11 F.3d at 26-27 (unpublished opinion).
24. 975 F.2d 568 (9th Cir. 1992).
25. *Id.* at 571-72 (unpublished opinion).
26. *National Classification Comm. v. United States*, 765 F.2d 164, 173 n.2 (D.C. Cir. 1985).



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